APPENDIX "A."

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

David Hyun, appellant, vs. Herman R. Landon, District Director, Immigration and Naturalization Service, appellee. No. 14,058.

January 31, 1955.

Appeal from the United States District Court, Southern District of California, Central Division.

Before: STEPHENS and CHAMBERS, Circuit Judges, and CLARK, District Judge.

STEPHENS, Circuit Judge:

David Hyun appeals from a judgment of the United States District Court, denying and dismissing his petition for the writ of habeas corpus in which appellant sought release from the custody of appellee who was holding him under a final order of deportation. Appellee Landon is the District Director of the Immigration and Naturalization Service.

Appellant is a native of Korea and asserts citizenship of China. He was admitted to the United States at Honolulu. Territory of Hawaii, on May 26, 1924, at which time he was seven years old. He was admitted to the continental United States at Los Angeles, California, on September 1, 1947. A warrant for his arrest in deportation proceedings was issued and served on him on October 21, 1950, in which appellant was charged as an alien who, after entry, had been a member of the Communist

Party of the United States.[1] Pursuant to the warrant, Hyun was taken into custody pending determination of his deportability.

Hearings were started on November 22, 1950, at which time the hearing officer granted a motion by the examining officer to take the depositions of four witnesses in Honolulu. Timely notice was given and appellant's counsel was informed that appellant could be present, could submit written interrogatories and could present witnesses, or could be represented by counsel. Accordingly, depositions were taken in Honolulu on December 18, 1950, but appellant was not present or represented. Nor did he submit direct interrogatories.

On March 28 and 29, 1951, the deportation hearing was resumed, at which time appellant's counsel made specific objections to certain questions and answers contained in the Honolulu depositions. At this time appellant disclaimed any desire to present cross interrogatories to the Honolulu witnesses or to present witnesses of his own. Appellant testified but refused to answer any question concerning communist party membership on the grounds that it might tend to incriminate him and that it violated his rights under the first amendment to the Constitution of the United States. On April 19, 1951, appellant once again stated that he would not submit cross interrogatories to the Honolulu witnesses. The hearing officer, relying only on the depositions of Uesugi and Izuka, found the appellant deportable. The finding of the hearing officer

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[1]The warrant charged Hyun with deportability for violation of the "Act of October 16, 1918, as amended, in that he has been after entry a member of the following class set forth in § 1(2)(c) of said Act: an alien who was a member of the Communist Party of the United States. 8 U.S.C.A. 137(2)(c) 1951 pocket part."

was adopted by the Assistant Commissioner and appellant was ordered deported. Subsequently, the Board of Immigration Appeals dismissed appellant's appeal and the action from which the instant appeal is taken was filed on July 24, 1953.

THE TAKING OF THE DEPOSITIONS IN HAWAII

It is contended by appellant that the action of the immigration Service in taking the depositions of Uesugi and Izuka in Honolulu, while he was in custody in California, deprived him of the essential ingredients of due process of law. The argument is that not only was Hyun in the custody of appellee at the time the depositions were taken but that he was financially unable to transport his counsel to Honolulu or procure Honolulu counsel to represent him at the depositions. In view of the comparative financial resources of Hyun and the government of the United States, and in further consideration of the plethora of government transportation between Hawaii and the west coast, it is appellant's contention that the government should have transported the witnesses to the west coast for the depositions, or in the alternative provided transportation to Hawaii for Hyun and his attorney. Failure to do either, it is alleged, deprived appellant of essential ingredients of due process of law.[2]

An alien in deportation proceedings must be afforded due process of law, including a fair hearing, Wong Yang Sung v. McGrath, 339 U. S. 33, and indispensable to a fair hearing are reasonable notice, the right to examine

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[2]Circumstances relating to adequate counsel for persons charged with Communist adherence indicate that it would not be unreasonable for the trier of fact to disbelieve that appellant could not be represented at the Honolulu hearings.

witnesses and to testify and to present witnesses and to be represented by counsel, all of which appellant had. This court has repeatedly held that financial inability of an alien to insure attendance of himself or his attorney, or both, at the place where depositions are being taken is not a denial of due process. As was stated in Bhagat Singh v. McGrath, 1939, 9 Cir., 104 F. 2d 122, 123:

> "Deportation hearings are civil in nature and the alien need not be confronted by the witnesses; evidence may be obtained by deposition * * * We have heretofore decided that the fact that an alien is financially unable to travel to a place where he could cross examine the witnesses, or send an attorney is not a denial of the right of cross examination."

See also Channan Singh v. Haff, 1939, 9 Cir., 103 F. 2d 303; and Kishan Singh v. Director, 1936, 9 Cir., 83 F. 2d 95. See, too, Berkman v. Tillinghast, 1932, 1 Cir., 58 F. 2d 621, 622; Hale v. Henkel, 1906, 201 U. S. 43.

Cases cited by appellant to sustain the view that the government erred in not insuring the presence of Hyun at the taking of the depositions, are not applicable to the instant case:

Maltez v. Nagle, 1928, 9 Cir., 27 F. 2d 835—The hearing officer refused to produce for examination persons whose statements were *ex parte;*

Caranica v. Nagle, 1928, 9 Cir., 23 F. 2d 545—It was held that the hearing was not unfair where cross examination was not allowed as to a witness whose testimony had been received but whose testimoney was not considered as to the decision;

In re Sugano, 1930, D. C., Calif., 40 F. 2d 961—The hearing was held unfair where proper cross-examination had been denied.

Failure to assert one's rights merely because to do so would necessitate some inconvenience can only be construed as a waiver of the right. Kishan Singh v. Director, 1936, 9 Cir., 83 F. 2d 95.

Rulings of the Hearing Officer

When the depositions of the Honolulu witnesses were offered in evidence at the Los Angeles hearings of March 28 and 29, 1951, appellant objected to certain of the questions or answers which he felt were improper under established rules of evidence. The hearing officer seriatim overruled appellant's objections. Appellant argues that this action of the hearing officer admitted a mass of incompetent evidence which fatally corrupted both the hearing and the record. It was strongly stated by appellant's counsel both in the briefs and at the hearing that the conduct of the presiding officer bespoke "a marked lack of that degree of judicial objectivity which a fair hearing connotes." It would seem clear that the action of the hearing officer in rejecting all of appellant's motions and objections was not in and of itself a denial of due process of law, without a showing that the objections were well taken, and that the action actually resulted in a denial of due process.

It is well settled that the power of Congress to regulate the deportation of aliens is plenary and only in the case of extreme abuse will the courts intervene. As stated in Carlson v. Landon, 1952, 342 U. S. 524, 536, "* * * it is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country is deemed hurtful." See also: Harisiades v. Shaughnessy, 1952, 342 U. S. 580; Shaughnessy v. Mezei, 1953, 345 U. S. 206; Bugajewitz v. Adams, 1913, 228

U. S. 585, 591; Ng Fung Ho v. White, 1922, 259 U. S. 276, 280; Ocon v. Landon, Dec. 1954, 9 Cir., ... F. 2d .....; Galvan v. Press, 1953, 9 Cir., 201 F. 2d 302; Carlson v. Landon, 1950, 9 Cir., 186 F. 2d 183. Consequently, when the Supreme Court held the provisions of the Administrative Procedures Act[3] applicable to deportation hearings, Sung v. McGrath, 1950, 339 U. S. 333, Congress subsequently specifically exempted such proceedings from the requirements of the Act.[4] The procedure to be followed in deportation proceedings is presently embodied in the Immigration and Nationality Act.[5] Marcello v. Ahrens, 1954, 5 Cir., 212 F. 2d 830, 836; Galvan v. Press, 1953, 9 Cir., 201 F. 2d 302, 304.

In this connection it is settled that deportation proceedings are civil in nature, not criminal. Carlson v. Landon, 1952, 342 U. S. 524; Bhagat Singh v. McGrath, 1939, 9 Cir., 104 F. 2d 122.

Traditionally, the formal exclusionary rules of evidence present in judicial proceedings have been relaxed in administrative practice. As stated by this court in Scheeps v. Carmichael, 1949, 9 Cir., 177 F. 2d 391, 395: "Common law rules of evidence are not based in constitutional interdictions and administrative tribunals are not bound

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[3]Title 5 U.S.C.A. §1001 et seq., June 11, 1946, c. 324, §2, 60 Stat. 237; as amended Aug. 8, 1946, c. 870, Title III, §302, 60 Stat. 918; Aug. 10, 1946, c. 951, Title VI, §601, 60 Stat. 993; March 31, 1947, c. 30, §6(a), 61 Stat. 37; June 30, 1947, c. 163, Title II, §210, 61 Stat. 201; March 30, 1948, c. 161, Title III, §301, 62 Stat. 99.

[4]Supp. Approp. Bill Rider, Sept. 27, 1950, 64 Stat. 1048.

[5]Title 8 U.S.C.A. §1252(b), June 27, 1952, c. 477, Title II, ch. 5, §242, 66 Stat. 208.

by such rules except those perpetuated in governing relations." See also the following cases by this court:

Willapoint Oysters v. Ewing, 1949, 9 Cir., 174 F. 2d 676, 690;

Kunimori Ohara v. Berkshire, 1935, 9 Cir., 76 F. 2d 204;

Singh v. Director, 1938, 9 Cir., 96 F. 2d 969, 971;

Ex Parte Shigenari Mayemura, 1931, 9 Cir., 53 F. 2d 621.

This rule is followed by the Supreme Court, N. L. R. B. v. Donnelly Co., 1947, 330 U. S. 219, and the other circuits. Rhodes Pharmacal Co. v. F. T. C., 1953, 7 Cir., 208 F. 2d 382, 387; Tassari v. Schmucker, 1931, 4 Cir., 53 F. 2d 570, 572; Murdock v. Clark, 1931, 1 Cir., 53 F. 2d 155, 156; Hayes v. Hatges, 1938, 8 Cir., 94 F. 2d 67, 68. Under this rule both opinion and hearsay evidence have been deemed admissible. In *Ex Parte* Seisuke Fukumoto, 1931, 9 Cir., 53 F. 2d 618, certain immigration inspectors were permitted to state their opinions from viewing photographs that persons bearing different names were actually one and the same alien.

In United States v. Wallis, 1922, 2 Cir., 279 F. 401, the court said at page 403: "Since the only legal limitation upon departmental procedure is that a hearing, fair though summary must be accorded *hearsay evidence is admissible.*" [Emphasis added.] See also Morrell v. Baker, 1920, 2 Cir., 270 F. 577; United States v. Uhl, 1920, 2 Cir., 266 F. 34; and Christianson v. Zerbst, 1937, 10 Cir., 89 F. 2d 40. Furthermore, contrary to appellant's contention the mere fact that incompetent evidence was received and considered does not establish want of due process in the hearing such as would require a reversal

on that ground. Tisi v. Tod, 1924, 264 U. S. 131; Vajtauer v. Comm'r of Immigration, 1927, 273 U. S. 103; and *Ex Parte* Jurgans, 1927, 17 F. 2d 507. See, also, United States v. O'Rourke, 1954, 8 Cir., 211 F. 2d 609, and the collection of authority contained therein at page 611.

The Substantiality of the Evidence

It is next urged by appellant that the deportation order cannot stand as it is not based upon reasonable substantial and probative evidence as required by the Act.[6] (Rubinstein v. Brownell, 1953, C. A., D. C., 206 F. 2d 449, affirmed by a divided court, 98 L. Ed. 234.) The argument is that of the four depositions taken in Honolulu, two were disregarded by the immigration authorities in arriving at their decision. Hence the order to deport Hyun is based solely upon the testimony of Uesugi and Izuka, there being no other evidence to sustain the substantive charge of membership in the Communist Party of the United States. Appellant then attacks the testimony of these witnesses on the basis of non-responsive and voluntary answers and general understandability. The testimony of Uesugi was characterized at one point as being given "with vagueness approaching unintelligibility," while Izuka was labeled a wholly incompetent witness and his testimony such as to corrupt and debase the entire proceeding. As a conclusion, appellant states that this hearing was in effect an *ex parte* hearing in his absence.

We have read and studied the depositions as a whole, and we are unable to agree with appellant's contentions.

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[6] 8 U.S.C.A. §1252(b)(4), June 27, 1952, c. 477, Title II, ch. 5, §242, 66 Stat. 208.

Both Uesugi and Izuka testified that they had joined the Communist Part in Honolulu and had come in contact with appellant at Communist meetings, as members. This has not been denied by appellant. Both this court and the Supreme Court of the United States have held that an inference may be drawn from the refusal of an alien to testify on his own behalf in deportation proceedings. Bilokumsky v. Tod, 1923, 263 U. S. 149, 153. And see Vajtauer v. Comm'r of Immigration, 1927, 273 U. S. 103, and Kunimoro Ohara v. Berkshire, 1935, 9 Cir., 76 F. 2d 204; Chan nom. Gee v. United States, 1932, 9 Cir., 57 F. 2d 646, 650.

The Constitutional Question

At the time the briefs in the instant case were written, the Supreme Court had recently decided in Galvan v. Press, 1954, 347 U. S. 522, that the statute attacked here[7] was constitutional and that it did not deprive aliens of due process of law by dispensing with proof of the character of the Communist Party in deportation proceedings. Also considered and decided negatively was the question of whether support or demonstrated knowledge of the Communist Party's advocacy of violence was intended to be a prerequisite to deportation. Subsequently the court granted certiorari in Garcia v. Landon, No. 279 Misc., ... U. S. ....., 74 S. Ct. (Adv. Ops.) 873, a case in which the constitutionality of deportation under the instant statute was upheld upon authority of the Galvan case. As a result, a petition was filed seeking a rehearing in Galvan v. Press. Both the Garcia appeal and the Galvan petition for rehearing were pending at the time the briefs in the instant case were filed. Appellant treated the decision in Galvan as not yet final and argued at length the constitu-

tional questions which were treated therein. Thereafter and during the October, 1954, term of court, Garcia was dismissed as moot and the petition for rehearing in Galvan was denied. Galvan thus becomes final, and the holding that the Internal Security Act of 1950 is constitutional is controlling in the instant case. The Supreme Court in commenting on the action of Congress in making present or prior membership of an alien in the Communist Party in and of itself ground for deportation, stated at page 529 (347 U. S. 522), "Certainly, we cannot say that this classification by Congress is so baseless as to be violative of due process and therefore beyond the power of Congress."

The judgment of the district court is affirmed.

(Endorsed.) Opinion. Filed Jan. 31, 1955.

PAUL P. O'BRIEN, *Clerk.*

APPENDIX "B."

U. S. Department of Justice
Immigration and Naturalization Service
Los Angeles 13, California

File Numbers
1600-61258 and
A 3 611 569

Apr. 24, 1951

Decision of the Hearing Officer
In Re
David Hyun
in Deportation Proceedings

Charges

Warrant: The Act of October 16, 1918, as amended, in that he has been after entry a member of the following class set forth in Section 1(2)(C) of said Act: An alien who was a member of the Communist Party of the United States.

Lodged: None.

I. Discussion of the Evidence—Deportability

The respondent testified that he was born on January 3, 1917, in Seoul, Korea, and is in possession of a passport which shows him to be a citizen of China. This passport shows his birthplace as Kirin, Manchuria, and was issued at the Chinese Consulate General at Honolulu, T. H. on August 21, 1947. The respondent was admitted into the United States for permanent residence at Honolulu, Territory of Hawaii, on May 26, 1924, and at that time the record shows him to have been a citizen of China and gives his place of birth as Seoul, Korea. He resided continuously in the Hawaiian Islands until he came to the

mainland of the United States when he was landed at Los Angeles, California, on September 1, 1947.

When questioned as to membership in the Communist Party of the United States the respondent declined to answer the questions on the ground that such answers might tend to incriminate him, claiming the privilege under the Fifth Amendment to the Constitution of the United States and further claimed the privilege of remaining mute or declining to answer on the ground that it violated his rights under the First Amendment to the Constitution of the United States.

Depositions in this case were taken at Honolulu, T. H. on December 18, 1950, from four persons. Counsel was notified of the date and place the depositions were to be taken and was advised that the respondent could be represented by counsel at those proceedings. The respondent was not represented by counsel when the depositions were taken.

Of the depositions taken from the four persons, only the depositions of two of those persons are pertinent and relevant to the issue in this case. They are the depositions of Donald T. Uesugi and Ichiro Izuka.

The deponent, Donald T. Uesugi, was born on November 28, 1915, in Hanamalu, Kauai, in the Territory of Hawaii and has lived in the Territory of Hawaii all of his life. This deponent joined the Communist Party in the latter part of 1945 or the early part of 1946 and remained a member of that organization until the latter part of 1948. This deponent stated that he belonged to the Makiki cell of the Communist Party in Honolulu, and later belonged to the Punchbowl cell. While a member

of the Makiki cell he was the treasurer of that group and collected the dues.

This witness identified the respondent as David Hyun from the photograph as it appears on the Chinese passport of David Hyun and stated that he became acquainted with David Hyun about 1945 in connection with deponent's membership in the Communist Party.

The deponent Uesugi testified that he had attended meetings, closed meetings of the Communist Party, at the home of one Charlie Fujimoto on Kaia Street in Honolulu and that David Hyun attended some of these meetings. He had seen David Hyun attending meetings of the Makiki cell of the Communist Party on two or three occasions and again had seen him attending meetings of the Punchbowl cell about two or three times. This witness is somewhat indefinite as to the activities of the Communist Party but he is definite as to his own membership in the Communist Party and that the meetings of the Communist Party where he saw David Hyun were meetings that were closed to persons who were not members of the Communist Party and that David Hyun took part in these meetings as a member of the Communist Party.

The next deponent, Ichiro Izuka, was born on June 5, 1911, at Hanapepe, Kauai, and has resided in the Hawaiian Islands all of his life except for a brief period of residence on the mainland.

The deponent Izuka testified that he resided in Honolulu, Territory of Hawaii, from 1942 until 1947, and that he was a member of the Communist Party from 1938 until it disbanded about 1941, then he rejoined the Communist Party when it was reactivated in 1945, and resigned from the Communist Party in October of 1946.

This deponent was educated into the characteristics of the Communist Party not only in Hawaii but attended a training school of Communist Party members at 121 Haight Street in San Francisco, California.

This deponent identified David Hyun, the respondent, as a person that he had known as a member of the Communist Party and describes the set-up in Honolulu of the Communist Party at that time during 1945 and 1946. He states that during that time he definitely knew that David Hyun belonged to the Kaimuki Branch of the Communist Party and later at an executive board meeting of the Communist Party in the Territory of Hawaii he met David Hyun at one board meeting when David Hyun was representing the Punchbowl group of the Communist Party. Further, this witness places David Hyun as a representative of the Communist Party at at least three executive board meetings of the Communist Party where no persons other than members of the Communist Party were allowed to attend. This witness was also acquainted with David Hyun outside of the Communist Party as well as knowing him as a member of the Communist Party and a delegate representing the Punchbowl group of the Comunist Party at the executive meetings of the Communist Party. The witness is definite in his knowledge, and the testimony of the witnesses Uesugi and Izuka have not been controverted. Accordingly it must be found that the charge contained in the warrant of arrest is sustained.

II. Findings of Fact—Deportability

Upon the basis of all the evidence presented, it is found:

(1) That the respondent is an alien, a native of Korea and a citizen of China;

(2) That the respondent entered the United States at Honolulu, Territory of Hawaii, on May 26, 1924, and was admitted for permanent residence;

(3) That the respondent was a member of the Communist Party of the United States in Honolulu, Territory of Hawaii, during 1945 and 1946.

III. Conclusion of Law—Deportability

Upon the basis of the foregoing findings of fact, it is concluded:

(1) That under the Act of October 16, 1918, as amended, and Section 19 of the Immigration Act of 1917, the respondent is subject to deportation on the ground that he has been after entry a member of the following class set forth in Section 1(2)(C) of said Act of October 16, 1918, as amended: An alien who was a member of the Communist Party of the United States.

IV. Other Factors

The parents of the respondent are living in the United States and have been admitted to the United States for permanent residence. No other information was developed as to the family of the respondent. There are no other factors than have been previously discussed.

V. Recommended Order

It is recommended that the alien be deported from the United States pursuant to law on the charge stated in the warrant of arrest.

s/ JOHN B. BARTOS
John B. Bartos, *Hearing Officer*

Los Angeles, California

APPENDIX "C."

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

File: A-3611569-Los Angeles (1600-61258) Appeal 15

In re: David Hyun

IN DEPORTATION PROCEEDINGS Aug. 1, 1951

In Behalf of Respondent: Milton S. Tyre, Esquire, 650 South Grand Ave., Los Angeles 14, California.

Charges:

Warrant: Act of October 16, 1918, as amended—After entry, alien who was member of the Communist Party of the United States.

Lodged: None.

Application: Termination of proceedings

Detention Status: Released under $5000 bond

Discussion: Upon consideration of the entire record, including the exceptions taken, the recommended order of the officer conducting the hearing is hereby adopted.

Counsel for respondent has submitted a bill of exceptions. Therein he takes exception to the finding of fact that respondent was a member of the Communist Party of the United States, and to the conclusion of law that respondent is deportable under the Act of October 16, 1918, as amended.

The deportability of respondent stems from these provisions of the Act of October 16, 1918, as amended by Section 22 of the Internal Security Act of 1950 (Public Law 831—81st Congress; Chapter 1024—2nd Session; H. R. 9490):

"Sec. 4(a) Any alien who was at the time of entering the United States, or has been at any time thereafter, a member of any one of the classes of aliens enumerated in . . . section 1(2) of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry, into the United States."

Section 1(2) of said Act reads, in pertinent part:

"(2) Aliens who, at any time, shall be or shall have been members of any of the following classes: . . . (C) Aliens who are members of or affiliated with (i) the Communist Party of the United States . . ."

Thus, the Act of October 16, 1918, as amended, *inter alia,* subjects to deportation any alien who was, at any time after his entry into this country, a member of the Communist Party of the United States.

The record in this case establishes that respondent is an alien, who entered the United States on May 26, 1924, and that he was a member of the Communist Party of the United States in 1945 and 1946. The foregoing facts render respondent deportable under the Act of October 16, 1918, as amended.

Counsel questions the constitutionality of the Act of October 16, 1918, as amended, and the Act of February 5, 1917, as amended. Determination of the constitutionality of a statute enacted by the Congress is beyond the reach of this Service. That is a function restricted to the

judicial branch of the government. Panitz v. District of Columbia, 112 F. (2d) 29, 42 (C. A. D. C., 1940). Todd v. Securities and Exchange Commission, 137 F. (2d) 475, 478 (C. A. 6, 1943).

It is contended by counsel that respondent's constitutional rights were violated, in that these proceedings were held while respondent was kept in custody of this Service. The record discloses that these proceedings were held over a period extending from November 22, 1950 to April 19, 1951. We find that respondent was afforded ample opportunity to prepare a defense to the charge placed against him by the government.

It is further contended by counsel that the hearing officer was biased and prejudiced. Counsel points to the fact that the hearing officer, being in the employ of this Service, was subject to its direction, instruction, and control, and therefore unable to render an unbiased and impartial decision.

In one respect, a federal judge and a hearing officer stand on the same footing,—both are, and have been, in the employ of the federal government. It would be an absurdity to disqualify a federal judge from presiding at a proceeding solely because that proceeding had been instituted by the federal government. The hearing officer is in an analogous position.

The conduct of the hearing officer is bound by the provisions of 8 C. F. R. 151.2(b), effective September 14, 1950 (published 15 F. R. 6169, September 14, 1950), which states, in part:

> "(b) *Hearing officer; general duties.* The hearing officer shall conduct a fair and impartial hearing. He shall use his independent judgment in rendering his

decision and shall not perform any duties inconsistent with the duties and responsibilities of an adjudicating officer . . ."

In the instant case, there is no evidence that the hearing officer consulted any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; or that the hearing officer engages in the performance of investigative or prosecuting functions; or that the hearing officer is responsible to or subject to the supervision or direction of any officer or employee of this Service engaged in the performance of investigative or prosecuting functions. Further, there is no evidence of personal bias or prejudice on the part of the hearing officer in favor of the Government or against respondent. Accordingly, we find that it was proper and legal for the hearing officer to have presided at these proceedings.

Counsel next protests that the hearing officer permitted depositions to be taken in Hawaii, without providing transportation to that place for the respondent or counsel. The law requires no such provision.

Objection is also made to the admissibility in evidence of the contents of these depositions. We have carefully examined the contents of the depositions in question, and we find that deponents Uesugi and Izuka testified that they had seen respondent in attendance at meetings restricted to members of the Communist Party of the United States. According to their testimony, these meetings occurred during 1945 and 1946. We find that this evidence is substantial and reliable, and that it fully sustains an order of deportation. When respondent was asked during these proceedings whether he was a member of the Communist Party of the United States, he replied that he refused to

answer that question on the ground that it might tend to incriminate him.

Counsel takes exception to the refusal of the hearing officer to grant motion of counsel to reopen the hearing for the purpose of introducing evidence concerning the nature of the Communist Party of the United States. The nature of said Party is not in issue in these proceedings and we find that the hearing officer properly denied this motion.

Order: It is ordered that the alien be deported from the United States, pursuant to law, on the charge stated in the warrant of arrest.

s/ A. C. DEVANEY
Assistant Commissioner, Adjudications Divisions

AG:cam
AG J.P.S.

APPENDIX "D."

U. S. DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

Dec. 1—1952

File: A-3611569-Los Angeles (1600/61258)

In re: David Hyun

IN DEPORTATION PROCEEDINGS

In Behalf of Respondent: Blanche Friedman, Esq., 220 Broadway, New York, N. Y., and Richard W. Petherbridge, Esq., 257 South Spring Street, Los Angeles, California, and Isidore Englander, Esq. (heard March 12, 1952), 205 East 42nd Street, New York, N. Y.

Charges:

Warrant: Act of October 16, 1918, as amended—After entry alien who was member of Communist Party of United States

Application: That appeal be sustained; or that the proceedings be reopened

Detention Status: Released under bond

This is an appeal from the decision of the Assistant Commissioner on August 1, 1951, finding this respondent deportable on the charge in the warrant of arrest and directing that he be deported pursuant to law.

In oral argument and in brief submitted by counsel, all of the constitutional questions relating to due process, violation of the First Amendment, Bill of Rights and Attainder, and unfair and impartial hearing have been argued. In addition thereto, counsel contends that the Act of October 16, 1918, as amended in 1940, is unconstitu-

tional insofar as it is applicable to this respondent. Counsel specifically requests that the case be reopened for rehearing to incorporate the testimony of witnesses to supplement the evidence alleged to have been taken in the form of depositions or sworn statements from persons in the Territory of Hawaii, with no opportunity for the alien to cross-examine such deponents.

Counsel believes that there is insufficient relevant and material evidence to support the ground for deportation.

This respondent is a 34-year old male, native of Korea, citizen of China, who was admitted to the Territory of Hawaii at Honolulu on May 26, 1924 for permanent residence. He came to continental United States on September 1, 1947, and has resided in this country to the present time. Warrant of arrest was served in this proceeding on October 31, 1950 and hearing began on November 22, 1950, and was concluded April 19, 1951 in California.

The Hearing Officer has summarized the evidence in this case and it is unnecessary to repeat the facts here. He has found that the uncontroverted testimony of two witnesses establishes that this alien was a member of the Communist Party of the United States in Honolulu, Territory of Hawaii, during 1945 and 1946; and that during such period he attended Communist party meetings as a representative and as a delegate.

The Assistant Commissioner has carefully reviewed the case and in his memorandum and decision of August 1, 1951 has answered many of the pertinent questions raised by counsel. He has found that the evidence which shows that this respondent was a member of the Communist Party of the United States during 1945 and 1946 is substantial and reliable and fully sustains the ground for

deportation. The respondent has, on advice of counsel, refused to state whether he was a member of the Communist Party of the United States after his entry to this country.

We have carefully reviewed the pertinent evidence in this case and we find that there is substantial and reliable evidence which has been uncontroverted and which shows that this respondent was a member of the Communist Party of the United States during 1945 and 1946. We further find that he was an active member of such Party and that his membership in the Communist Party was voluntary.

Concerning the constitutional questions urged by counsel, it is noted that on March 19, 1952, the Supreme Court of the United States, in the case of Harisiades v. Shaughnessy, 342 U. S. 580 (72 S. Ct. 512), held that the United States may constitutionally deport a legally resident alien because of membership in the Communist Party of the United States. Furthermore, in an expressed opinion in Martinez v. Neelly, 197 F. 2d 462 (C. C. A. 7, 1952), the Court stated that membership in the Communist Party, present or past, is as a matter of law ground for deportation.

Concerning the request of counsel for rehearing in the case to receive testimony of witnesses to supplement the evidence in the nature of depositions or sworn statements taken about December 18, 1950 in Honolulu, Hawaii, in order that counsel may cross-examine such witnesses, it is noted that appropriate notice was given to counsel for the respondent on December 7, 1950, apprizing him that such statements or depositions would be taken and giving the respondent an opportunity to be present in person or through counsel and cross-examine the deponent. It ap-

pears that an appearance was waived by counsel for the alien (Ex. 5). Counsel now contends that the alien is not financially able to send a representative to Honolulu to appear for him, and was not able to do so in November or December of 1950. There is no provision of law or regulations which requires that the United States Government provide transportation for an alien or counsel to the place of hearing in a situation such as in this case where the respondent resides in the State of California and depositions were taken in Hawaii.

In view of the foregoing discussion it must be concluded that counsel's points of argument are without merit; that the record clearly sustains the ground for deportation; and that the appeal should be dismissed.

Order: It is ordered that the appeal from the decision of the Assistant Commissioner on August 1, 1951 be and the same is hereby dismissed.

s/ THOS. G. FENNIMONE (?)
Chairman

APPENDIX "E."

In the District Court of the United States, Southern District of California, Central Division. No. 15743-HW.

David Hyun, Petitioner, vs. Herman R. Landon, District Director, Immigation and Naturalization Service, Respondent.

Memorandum Opinion

An order to show cause why the petitioner should not be released from custody having heretofore been issued and the matter having been submitted for decision; it appearing to the court that there is sufficient evidence to support the warrant of deportation as disclosed from the records of the Immigration and Naturalization Service; the entire record having been submitted to the court for review and the court having reviewed said record;

It Is Hereby Ordered that the order to show cause heretofore issued be and is hereby dismissed, and

It Is Further Ordered that the petition for the issuance of a writ of habeas corpus be and is hereby denied, and

It Is Further Ordered that the custody of Petitioner be not disturbed in accordance with the rulings of the Circuit Court in the Carlisle matter, under opinion dated June 26, 1953. I view the [75] ruling of this circuit as binding upon this court until the Supreme Court rules to the contrary. I recognize Mr. Justice Douglas has made a different ruling in the Carlisle case but I do not feel that I am bound to accept as a precedent the ruling of an individual member of the Supreme Court.

Besides, I feel that the Carlisle case presents a different picture entirely from the case at bar. In this matter the Immigration and Naturalization Service was actually in

the process of deporting the petitioner under a warrant of deportation at the time of the filing of the writ after a full hearing and review by the Board of Immigration Appeals.

If the petitioner is to be granted his liberty while the matter grinds its way through the usual and laborious processes of the reviewing courts, the results will make a mockery of the government's attempt to exclude aliens that Congress has held to be undesirable.

Dated: This 21st day of August, 1953.

/s/ BEN HARRISON,
Judge.

[Endorsed]: Filed August 21, 1953.

Docketed and entered August 21, 1953. [76]